

## ADMINISTRATIVE APPEAL DECISION

OWENS DEVELOPMENT GROUP, FILE NO. 2000-00637

PORTLAND DISTRICT

DATE: February 28, 2003

**Review Officer:** Mores Bergman, U.S. Army Corps of Engineers (Corps) Northwestern Division

**Appellant:** Peter Eslick, Owens Development Group

**Appellant's Representative:** Frank Flynn, Perkins-Coie

**Receipt of Request For Appeal:** October 24, 2002

**Authority:** Section 404 of the Clean Water Act

**Appealed Action:** Approved Jurisdictional Determination

**Site Visit Date:** December 12, 2002

### BACKGROUND INFORMATION:

The Corps Portland District (District) received a permit application dated June 13, 2000 for a proposed commercial development project by Bi-Mart Corporation, to be built on the site in question, which is located in Gearhart, Oregon, and owned by the Owens Development Group. Included with the application for the project was a wetland delineation report and map for the site, which was prepared by the consulting firm of Terra Science, Inc. (TSI).

In a letter dated November 15, 2001, the District informed TSI that they had discovered some errors in the wetland delineation map, while reviewing proposed project modifications, which had been submitted by the applicant in August 2001. As a result of the letter, an onsite meeting was held between the District and Mr. Phil Scoles of TSI, on December 12, 2001, to review the wetland delineation and gather additional field data. On January 22, 2002, the District sent a follow-up letter to Mr. Scoles informing him that the District did not concur with TSI's wetland delineation and that the Corps was reviewing additional data before making a final jurisdictional determination for the site. By letter of January 30, 2002, Mr. Scoles submitted some changes to the TSI wetland delineation for the District's consideration. On April 26, 2002, Mr. Eslick sent a letter to the District withdrawing the permit application for the project pending resolution of the wetland delineation issues.

## INFORMATION RECEIVED DURING THE APPEAL REVIEW AND ITS DISPOSITION:

The District provided the Review Officer and the appellant with a copy of the administrative record for the jurisdictional determination, which included the basis for JD, and maps and photographs of the area in question. This information was considered in the appeal review.

A site visit and meeting were held at Gearhart, Oregon on December 12, 2002. Information gathered at the site visit and meeting was considered in the appeal review to the extent that it provided clarification of the reasons for appeal and the administrative record.

The Request for Appeal letter submitted by Mr. Frank Flynn on October 24, 2002, included an enclosure, labeled "Enclosure 4", which provided additional supporting information regarding the reasons for appeal. Enclosure 4 was considered in the appeal review to the extent that it provided clarification of the appeal reasons.

## SUMMARY OF DECISION:

I find that the appeal has merit in regard to Appeal Reasons 1,2,4, and 5. The District's jurisdictional determination is not supported by evidence in the administrative record regarding the District's wetland delineation. The record does not show that the wetland delineation complies with the requirements of the 1987 Wetland Delineation Manual. The decision is therefore remanded to the District to re-evaluate the JD for that portion of the site where the District and the appellant disagree on the jurisdictional boundary.

## APPEAL DECISION FINDINGS AND INSTRUCTIONS FOR DISTRICT ACTION (IF REQUIRED):

**Reason 1:** The Corps failed to follow procedures and criteria established in the 1987 Corps of Engineers Wetland Delineation Manual ("the 87 Manual") in attempting to determine its jurisdictional boundary at this site.

**Findings:** This reason for appeal has merit for the reasons contained in the "Discussion" section below.

**Action:** The *JD* is remanded to the District for additional field delineation of the wetlands at the site in accordance with the 1987 Wetland Delineation Manual.

**Discussion:** In enclosure 4 of the October 24, 2002 Appeal Request, Mr. Flynn presented explanations supporting the reasons for appeal. In the document, Mr. Flynn contends that the Corps (Portland District) did not follow the 1987 Manual in preparing their JD, particularly with regard to the hydrology part of the three-parameter test. He

On July 30, 2002, Mr. Scoles sent a letter to the District requesting that the property owner be allowed time to submit new information regarding the wetland delineation for the property in question.

On September 4, 2002, the District sent a letter Mr. Eslick providing him with an approved jurisdictional determination (ill) for the Owens Development Group property. The approved ill did not agree with the wetland boundary for the site that was prepared by TSI. As a result, on October 24, 2002, Mr. Flynn submitted a Request for Appeal of the approved ill to the Northwestern Division (NWD), on behalf of Owens Development Group.

**REASONS FOR APPEAL SUBMITTED BY APPELLANT:** The Reasons for Appeal (RF A) are summarized here for brevity. text of the RF A is contained in enclosure 1.

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**Reason 1:** The Corps failed to follow procedures and criteria established in the 1987 Corps of Engineers Wetland Delineation Manual ("the 87 Manual") in attempting to determine its jurisdictional boundary at this site.

**Reason 2:** The Corps failed to detennine or to take into account the "noffilal circumstances" at the site being delineated, because, among other things, the Portland District relied on observations of atypical site conditions caused by a beaver dam in a maintained drainage ditch.

**Reason 3:** The Corps used an out-of-date, discredited and inappropriate methodology to attempt to determine soil saturation.

**Reason 4:** The Corps inappropriately relied on aerial photographs and the presence of hydrophytic vegetation to determine whether the hydrology parameter of the Corps three-parameter delineation approach had been met and failed to "ground truth" the aerial data by any acceptable methodology.

**Reason 5:** The evidence relied upon by the Corps in making the JD failed to support the conclusions reached in relation to meeting saturated soil condition requirements contained in the 1987 Wetlands Manual.

**Reason 6:** The Corps omitted material facts, for example water table data, relevant to determining the wetland hydrology parameter of the delineation.

**Reason 7:** The Corps failed to document and support its decision that the small depressional wetland and other wetlands located on site are adjacent to a "navigable water" consistent with the U. S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001).

**Reason 8:** The Corps erred by relying on the "User Note" associated with paragraph 48 of the online version of the 1987 Manual.

stated that the District used "shortcut" methods, or other non-standard methods and assumptions, to conclude that the hydrology criterion was met.

In reviewing the District's approved JD dated September 4, 2002, it is found that the District used aerial photography, the consultant's (TSI) Wetlands Delineation Report, and the District's own on-site observations and random test-hole data, to make their ill. On pages 4 and 5 of the District's approved ill, the District discussed why they believe that TSI's wetland delineation was not correct and how the District arrived at a wetland delineation boundary that was different, and more expansive, than that determined by TSI.

In reviewing the wetland delineation methods used by the District, I find several areas where the District did not follow procedures and criteria contained in the 1987 Manual. First, I find that the District's field data reports, for test holes that were dug on December 12, 2001, were not prepared in the standard format nor did they show all information required by the 1987 Manual. Also the manual provides that specific procedures will be used for determining wetlands in disturbed areas; such as exist at the site in question. Section F of the 1987 Manual provides procedures for addressing these "atypical" situations. Although the District's September 4, 2002 ill clearly indicates that the site has been disturbed, their field reports do not show the kind of information required under the atypical procedures contained in the 1987 Manual. I further find that the wetland delineation data sheets prepared by TSI also do not meet the requirements of the 1987 Manual for the atypical situations. For example, TSI's data sheet for Transect point T3-P4, at the site, indicates that the test hole was dug on top of a berm composed of material side-cast from a drainage ditch. Since this test hole was located in a known disturbed area, it should have been delineated using the atypical procedures of the 1987 Manual, but was not.

I also find in reviewing the District's ill map, dated April 15, 2002, that they identified considerable more wetland area than what TSI had determined. I also find that there are several gaps within this expanded area where no field data was collected by either the District or TSI. The 1987 Manual requires (in Part IV) that field wetland determinations should be conducted to the extent necessary to adequately delineate the wetland boundary.

After reviewing the information contained in the District's ill and in TSI's delineation report, I conclude that neither the District nor the appellant's consultant properly followed the procedures contained in the 1987 Manual, regarding wetland determinations for disturbed areas on the site. As a result, I have determined that additional field delineations should be conducted in accordance with the 1987 Wetland Delineation Manual to properly determine the wetland boundary.

**Reason 2:** The Corps failed to determine or to take into account the "normal circumstances" at the site being delineated, because, among other things, the Portland District relied on observations of atypical site conditions caused by a beaver dam in a maintained drainage ditch.

**Findings:** This reason for appeal has merit, for the reasons contained in the "Discussion" section below.

**Action:** The District is required to prepare a new IIR for the site utilizing the 1987 Wetland Delineation Manual and giving special attention to the determination of "normal circumstances".

**Discussion:** In the explanation of the reasons for appeal contained in the October 24, 2002 appeal request, Mr. Flynn contends that the District did not properly apply the consideration of "normal circumstances" in making their jurisdictional determination at the site. He points out that at the time TSI performed their wetland delineation, in February and March 2000, a beaver dam did not exist in the drainage ditch that crosses the site. The record shows that a beaver dam was constructed on the drainage ditch about May 2000 and existed until mid-2002. The dam was not present when the appeal site visit was held in December 2002. Mr. Flynn further notes that in the District's IIR letter of September 4, 2002, the District stated: "The site's normal circumstance, when the original delineation was completed in Feb/Mar 2000, would not have a beaver dam." He also pointed out that the District had stated later in their IIR letter: "the Corps has attempted to evaluate the on-site wetland by utilizing information available supposedly prior to the beaver dam being built," which Mr. Flynn contends implies that the Corps recognized that the normal circumstance does not include the dam. Mr. Flynn also noted that the District's field observations and data collection occurred during the time when the dam was in place (December 2001), which the appellant believes is the reason for the higher than normal water level readings, observed by the District. Mr. Flynn further contends that the District did use this information in making their IIR as is indicated by the District's statement on page 5 of their September 4th IIR letter which reads: "We have re-evaluated the original data sheets utilizing water table and saturation information, applied information observed during Corps field visits, and determined the on-site wetland boundary for your property."

Information contained in the District's administrative record (aerial photography and the District's field data sheets) show that the water levels in the drainage ditch, and in the adjoining soils, were elevated at the time that the beaver dam was in place.

The 1987 Wetland Delineation Manual (On-Line version with User Notes), Part 1, page 4, provides the definition of "Normal Circumstances," as presented in the Corps of Engineers Regulatory Guidance Letter 90-07, dated September 26, 1990. The User Note states: "Normal Circumstances" has been further defined as "the soil and hydrology conditions that are normally present, without regard to whether the vegetation has been removed." The determination of whether normal circumstances exist in a disturbed area "involves an evaluation of the extent and relative permanence of the physical alteration of

the wetlands hydrology and hydrophytic vegetation" and "consideration of the purpose and cause of the physical alterations to hydrology and vegetation."

After reviewing the District's September 4, 2002 JD letter and other information in the administrative record, and considering the definition of "normal circumstances" shown above, I conclude that the District did not properly consider "normal circumstances" at the site when preparing their ill. I find that although the District stated that they

attempted to evaluate site conditions before the beaver dam was built, the District record indicates otherwise; that is, the District's JD was likely influenced by the site information obtained while the beaver dam was in place. Since the record indicates that the District's JD was not supported by adequate evidence (field wetland delineation data), I am requiring the District to perform additional field wetland data collection, in accordance with the 1987 Manual, for those areas where the District and the appellant disagree on the wetland delineation. The information is to be used in preparing a new ill for the site.

**Reason 3:** The Corps used an out-of-date, discredited and inappropriate methodology to attempt to determine soil saturation.

**Findings:** This reason for appeal does not have merit for the reasons contained in the "Discussion" section below.

**Action:** No action required by the District regarding this reason for appeal.

**Discussion:** In enclosure 4 of the September 24, 2002 appeal request (page 6), Mr. Flynn contends that the District did not properly use the 1987 Manual regarding soil saturation criteria. He pointed out that the Manual states that "for soil saturation to impact vegetation, it must occur within a major portion of the root zone (usually within 12 inches of the surface) of the prevalent vegetation." The Manual defines "major portion of the root zone" as "that portion of the soil profile in which one half of the plant roots occur." Mr. Flynn further noted that TSI had identified the root zone on their field data sheets and that they determined the root zones at the site to range from 3 to 6 inches.

In reviewing the TSI data sheets, it was found that TSI did indicate root zone depths of 3 to 6 inches, however, it does not appear that TSI used these criteria in determining if the hydrology criteria were met. The data sheets showed that in several instances TSI indicated that the wetland hydrology parameter was met when the saturation level was within 12 inches of the surface. During the site visit and meeting on December 12, 2002, Mr. Scoles verified that TSI did use the 12-inch saturation line in determining the hydrology parameter. Also at the site meeting, the District stated that it was their normal practice to use "saturation within 12-inches of the surface" as meeting the hydrology criteria because the 1987 Manual allows it, and determining the root zone is not always easy to do.

After considering the hydrology criteria contained in the 1987 Manual, the normal practice used within the District, and the method that was used by TSI in this case, I find that this portion of the appeal reason does not have merit.

Mr. Flynn had also contends in enclosure 4 of the October 24, 2002 letter that Mr. Goudzwaard of the District had used an improper technique called the "squeeze test" to determine if soil on the site was saturated.

At the site visit meeting held on December 12, Mr. Goudzwaard explained that squeezing the soil in his hand was one method he used to check for soil texture and relative wetness and as a quick method to compare soils at various locations on a site. He said that he did not use this practice to replace the procedures required in the 1987 Manual. In reviewing the District's September 4, 2002 JD and administrative record, I find nothing that would indicate that the squeeze test was used as the basis for determining jurisdiction at the site.

therefore find that this reason for appeal does not have merit.

**Reason 4:** The Corps inappropriately relied on aerial photographs and the presence of hydrophytic vegetation to determine whether the hydrology parameter of the Corps three. parameter delineation approach had been met and failed to "ground truth" the aerial data by any acceptable methodology.

**Findings:** This appeal reason has merit for the reasons contained in the "Discussion" section below.

**Action:** The District is required to re-evaluate the ill using the wetland delineation procedures in the 1987 Manual, to include performing additional field data collection in those areas where the District and appellant disagree on the line of jurisdiction.

**Discussion:** In enclosure 4 of the October 24, 2002 appeal letter, Mr. Flynn contends that the District inappropriately used aerial photography to determine wetland hydrology and to identify the extent of wetlands on the site. He states that there is no evidence that the District aerial photographs were "ground-truthed". He further contends that without "ground-truthing" the aerial photography, the results could not be relied upon.

In the District's September 4, 2002 JD letter (page 5), the District explained how they determined the final wetland boundary at the site. The District explained: "The revised wetland boundary was calculated by utilizing color infrared aerial photographs of 1989 and 2001 overlaid with mylar copies of the wetland boundaries as originally determined by the consultant" (TSI). The District further stated: "In evaluating original sample plots, the vegetative communities associated with those plots, topographic lie and comparison of water table and saturation depths between the original sample plots and Corps sample plots, we believe the revised boundary most accurately describes the wetlands boundary of the site."

In reviewing this information, including the photographs, and other information contained in the administrative record, I find that although the procedure that the District used does provide useful information as to where the wetlands may exist, it does not provide the accuracy required for delineating the exact line of Corps jurisdiction.

Therefore, I am requiring that additional "on the ground" field delineation procedures be conducted, in accordance with the 1987 Manual, in those areas where the District and the appellant disagree on the wetland delineation, and that information be utilized in re- evaluating the ill for the site.

**Reason 5:** The evidence relied upon by the Corps in making the ill failed to support the conclusions reached in relation to meeting saturated soil condition requirements contained in the 1987 Wetlands Manual.

**Findings:** This appeal reason has merit for the reasons contained in the "Discussion" section below.

**Action:** The District is required to re-evaluate the ill using the wetland delineation procedures in the 1987 Manual, to include performing additional field data collection in those areas where the District and appellant disagree on the line of jurisdiction.

**Discussion:** Mr. Flynn contends that the Corps has not presented any direct evidence to support their conclusions regarding jurisdiction at the site, specifically in documenting that the hydrology parameter has been met.

As discussed under Reasons 1 and 2 and 4 above, I have determined that the District did not provide adequate evidence to support their determination that the hydrology parameter had been met for all areas that the District had designated as wetland in their JD. Further the record does not show that the District properly followed the 1987 Manual in delineating wetlands on the site. In particular, the District did not perform adequate field delineation work to verify the line of jurisdiction under "normal circumstances".

I am therefore requiring the District to perform additional field wetland data collection, in accordance with the 1987 Manual, for those areas where the District and the appellant disagree on the wetland delineation, and that the District utilize the information in preparing a new JD for the site.

**Reason 6:** The Corps omitted material facts, for example, water table data, relevant to determining the wetland hydrology perimeter of the delineation.

**Findings:** This reason for appeal does not have merit for the reasons contained in the "Discussion" section below.

**Action:** No action required by the District regarding this reason for appeal

**Discussion:** Mr. Flynn contends that the District failed to consider all information provided to the Corps by ISI, including soil, water table, vegetation, and root zone data, He also said the District also overlooked important rainfall information that affected the water table at the site during the December 1999 through March 2000 timeframe.



In reviewing the District September 4, 2002 JD letter, I find that the District did discuss and consider information in TSI's Wetland Delineation Report data, as well as the rainfall data for the period in question in their making their jurisdictional determination.

I, therefore, find that this reason for appeal does not have merit.

**Reason 7:** The Corps failed to document and support its decision that the small depressional wetland and other wetlands located on site are adjacent to a "navigable water" consistent with the U. S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States* 531 U.S. 159 (2001).

**Findings:** This reason for appeal does not have merit for the reasons contained in the "Discussion" section below.

**Action:** No action required by the District regarding this reason for appeal.

**Discussion:** Mr. Flynn contends in his appeal request that the District provides no explanation to support their conclusion that wetlands on the site are considered adjacent. He also quotes several excerpts from the Supreme Court's SW ANCC decision, and then provides a discussion of his understanding of what the Court meant by "navigable waters".

In reviewing the District's September 4, 2002 JD, I find that the District did provide adequate justification for their determination that the wetlands are "adjacent wetlands" as defined in regulation 33 CFR 328. Attached to the District's ill letter is the Jurisdictional Determination form dated August 26, 2002, which explains that the wetlands on the site are adjacent to the unnamed tributary (drainage-way that crosses the site), and that that tributary drains into Newman creek, a navigable water. Since these waters are not isolated intrastate waters, it was not necessary for the District to address the SW ANCC decision in there ill. I therefore have determined that this reason for appeal does not have merit.

**Reason 8:** The Corps erred by relying on the "User Note" associated with paragraph 48 of the online version of the 1987 Manual

**Findings:** This reason for appeal does not have merit for the reasons contained in the "Discussion" section below.

**Action:** No action required by the District regarding this reason for appeal,

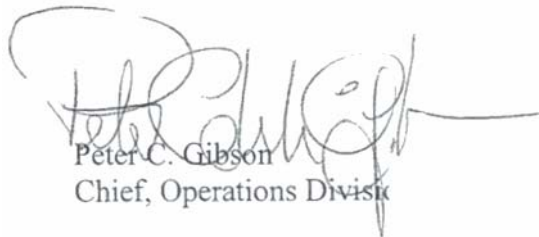
**Discussion:** Mr. Flynn contends enclosure 4 in his appeal request dated October 24, 2002 that it is not clear how User Notes in the Wetland Manual relates to the Table Sin the Manual regarding the 5% to 12.5% saturation requirements. He states that the user notes were added after the Manual was published and therefore should be considered little more than guidance.

In reviewing the District's administrative record and applicable Corps guidance I find that the District followed proper procedures in regard to use of the "user notes" in the 1987 Manual. The user note in question, regarding percentage of the growing season that the soil is saturated, originated from Corps Headquarters guidance provided October 7, 1991, which is still in effect.

1. therefore find that this appeal reason does not have merit.

#### OVERALL CONCLUSION:

After reviewing the appellant's reasons for appeal and reviewing information contained in the District's administrative record and information obtained during the site visit, I conclude that this Request For Appeal has merit for the reasons stated in the discussions above.



Peter C. Gibson  
Chief, Operations Division

Enclosure

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1. The Corps failed to follow the procedures and criteria established by in the 1987 Corps of Engineers Wetland Delineation Manual (the "1987 Manual") in attempting to determine its jurisdictional boundary at this site.
2. The Portland District failed to detennine or to take into account the "nonnal circumstances" at the site being delineated, because, among other things, the Pprtland District relied on observations of atypical site conditions caused by a transitory beaver dam in a maintained drainage ditch.
3. The Portland District used an out of date, discredited and inappropriate methodology to attempt to determine soil saturation.
4. The Portland District staff Inappropriately relied on aerial photographs and the presence ofhydrophytic vegetation to detenninewhether the hydrology parameter of the Corp's three-parameter delineation approach had been met and failed to "ground truth" the aerial data by any acceptable methodology.
5. The evidence relied upon by Corps staff in making the ill fails to support the conclusions reached in relation to:

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Documenting soil saturation to surface *or* in the major portion of the root zone as is required by the 1987 Manual;

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Providipg supporting evidence *for* the Portland District's "belief" that soils hold enough water in dry periods to support hydrophytic vegetation;

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The Portland District's observation that water in soil" at depth" demonstrates saturation of soil consistent with the criteria established by the 1987 Manual;

Providing evidence supporting the Portland District's contentions that the original data sheets submitted by Terra Science, Inc. were "re- evaluated" and th~ conclusions of that "re-evaluation";

Providing supporting evidence that saturation at 14 inches below ground surface (BGS) would meet the saturated soil criterion in the 1987 Manual, during whatever the Corps might consider a "normal rain cycle."

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6. Corps staff omitted material facts, for example, water table data, relevant to determining the wetland hydrology perimeter of the delineation.

7. Corps failed to document and support its decision that the small depressional wetland and other wetlands located on site are adjacent to a "navigable water" consistent with the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States* 531 U.S. 159 (2001).

8. The Portland District ElTed by Relying *on* the "User Note" Associated with Paragraph 48 of the Online Version of the 1987 Manual.

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